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No. 85-257

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANTHONY J. GRACZYK, JOHN HOWARD,
PETER CALACCI, AND HAROLD PICARD,
Petitioners

vs.

UNITED STEELWORKERS OF AMERICA,
Respondent

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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TEXT OF PERTINENT STATUTE:

§2(b) of Pub.L. 95-256, 92 Stat. 189 (1978) provides in full:

> The amendment made by subsection (a) of this section [amending subsec. (f)(2) of this section] shall take effect on the date of enactment of this Act [Apr. 6, 1978], except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938 [section 206(d)(4) of this title]), and which would otherwise be prohibited by the amendment made by section 3(a) of this Act [amending section 631 of this title], the amendment made by subsection (a) of this section [amending subsec. (f)(2) of this section] shall take effect upon the termination of such agreement or on January 1, 1980, which ever occurs first.

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UNITED STEELWORKERS OF AMERICA,
Respondent

Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

The pending Petition for Writ of *Certiorari* rests solely on the conflict between the decision of the Seventh Circuit below[1] and that of the Sixth Circuit in *Anness v. United Steelworkers of America*, 707 F.2d 917 (6th Cir., 1983). Though such a conflict surely exists, it is not one this Court need or should resolve since it involves interpretation of a narrow statutory exemption which expired nearly six years ago and cannot conceivably have an impact on anyone other than the one employer and four employees who are the parties in this case.

1. The opinion of the Seventh Circuit is officially reported as *Graczyk v. United Steelworkers of America*, 763 F.2d 256 (7th Cir., 1985).

STATEMENT OF THE CASE

1. Respondent, United Steelworkers of America, "USWA", is a labor organization representing workers in the steel and related industries. (App. A-3)[2] USWA employs approximately 800 staff representatives, who act as its agents for purposes of servicing its constituent local unions. (*Ibid.*) All four Petitioners were employed as staff representatives by USWA. (App. A-3, 12).

USWA's staff representatives are themselves represented for collective bargaining purposes by an independent labor organization, the Staffman's Organizing Committee, "SOC". (App. A-3). In six successive agreements executed in 1966, 1968, 1970, 1971, 1974, and 1977, the parties had incorporated a policy of mandatory retirement at age 65. (App. A-4). The Petitioners were retired at age 65 in 1979 under the terms of the 1977 agreement.[3] (*Ibid.*)

In their 1974-77 agreement, dated August 1, 1974, the parties had explicitly provided that the effective date of any successor agreement reached subsequent to July 31, 1977, would be August 1, 1977. (App. A-5). This 1974 understanding reflected the parties' recognition that USWA's contracts with the ten major steel producers were to expire on July 31, 1977, and that USWA needed to reach new agreements for its members before it could negotiate a contract with its own employees. (App. A-5, 31).

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2. Citations to "App." refer to the Appendix to the Petition For Writ Of *Certiorari*. The opinion of the Court of Appeals is Attachment A to the Appendix.

3. A factual dispute existed below as to whether Petitioner Picard voluntarily retired. This question is immaterial to the pending Petition.

On August 1, 1977, the 1974 agreement expired. (App. A-29, 30). Prior to its expiration, the parties began negotiations for a new agreement in July, 1977, which negotiations were completed on October 12, 1977. (App. A-5). The contract was formally signed on November 1, 1977, and provided that:

> This Agreement, *dated as of August 1, 1977*, is between the [USWA] and the [SOC]. Except as otherwise specified herein, the provisions of this Agreement shall be *effective August 1, 1977*. This Agreement supercedes and replaces the agreement between the parties dated August 1, 1974. (App. A-5, 6, emphasis added)

This retroactivity feature of the 1977 Agreement was wholly consistent with the past practice of USWA and SOC. (App. A-30). Thus, their 1971 agreement was not executed until April 18, 1972, but was dated and made effective on August 1, 1971. (App. A-30, f.11). And their 1974 agreement, which was signed on February 14, 1975, was dated and made effective on August 1, 1974. (*Ibid.*)

2. When the 1977 agreement was negotiated, its policy of mandatory retirement at age 65 was clearly lawful under this Court's decision in *United Air Lines Inc. v. McMann*, 434 U.S. 192 (1977). (App. A-6). However, *McMann* was overruled by the 1978 amendments to the Age Discrimination in Employment Act, P.L. No. 95-256, 92 Stat. 189 (1978), which altered the Act in two relevant aspects. (*Ibid.*) First, §12 of ADEA, 29 U.S.C. §631, was amended, effective January 1, 1979, to raise the upper limit of the protected class from age 65 to age 70. (*Ibid.*)

Second, §4(f)(2) of the Act, 29 U.S.C. §623(f)(2),[4] prohibited mandatory retirement pursuant to a bona-fide pension plan or seniority system of any individual within the class specified by §12. (App. A-7).

The effective date of the amendment to §4(f)(2) was spelled out in §2(b) of P.L. No. 256, 92 Stat. 189 (1978), which provided in pertinent part:

> The amendment [to 29 U.S.C. §623(f)(2)] shall take effect on [April 6, 1978] except that, in the case of employees covered by a collective bargaining agreement *which is in effect on September 1, 1977*, which was entered into by a labor organization . . . and which would otherwise be prohibited by [29 U.S.C. §631] the amendment [to 29 U.S.C. §623(f)(2)] shall take effect upon the termination of such agreement *or on January 1, 1980*, which ever occurs first. (App. A-8, emphasis added).

Following their passage, USWA sought an opinion from the Department of Labor as to the effect of the 1978 Amendments on its policy of mandatory retirement at age 65. (App. A-8, 9). On July 21, 1978, counsel for USWA met with Donald Elisburg, Assistant Secretary of Labor for Employment Standards, and other Department of Labor officials to determine whether the agreement, dated August 1, 1977, would be deemed "in effect" on September 1, 1977, within the meaning of §2(b). (*Ibid.*) At the meeting, the Department of Labor officials informed USWA that it qualified for the §2(b) exemption.

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4. Sections 12 and 4(f)(2), as amended, are set forth in the Petition at xi-xii.

(App. A-9)[5] Thereafter, USWA continued to enforce its age 65 retirement policy until January 1, 1980.

3. Two lawsuits were filed in 1980 by staff representatives challenging USWA's mandatory retirement policy. One action was filed in the Northern District of Ohio by Frank Anness. A second was begun in the Northern District of Illinois by Petitioner Anthony Graczyk, in which action Petitioners John Howard, Peter Calacci, and Harold Picard joined as additional plaintiffs. In both suits, USWA prevailed in the District Court on summary judgment.[6]

On appeal, the Sixth Circuit reversed, and the Seventh Circuit affirmed. In so doing, they disgreed on a single narrow issue of statutory construction: whether the §2(b) exemption encompassed agreements executed subsequent to September 1, 1977, but made retroactive by their terms to be effective on that date. The Sixth

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5. Responding to an inquiry from Leroy D. Clark, EEOC General Counsel, Assistant Secretary Elisburg provided an account of the meeting in a letter, dated October 20, 1980:

> To the best of my recollection we were unanimous in stating that such an agreement would be considered by us to be 'in effect on September 1, 1977' *if* the purpose of the retroactivity was not a subterfuge to get around the purposes of the Act and to avoid application of the ADEA amendments as of January 1, 1979. As we were informed by the [USWA's] counsel that such retroactivity was completely consistent with past practice, that the retroactivity feature of the 1977 contract was agreed to by the parties in 1974, and that the retroactiviy became effective when the current 1977 agreement was signed, which was well before the adoption of the ADEA amendments, it seemed clear to us that the retroactivity was not a bad faith effort by the [USWA] to get around the new age 70 mandatory retirement age. (App. A-9, 10, emphasis in original letter)

6. The opinion of the Northern District of Ohio is unofficially reported as *Anness v. United Steelworkers of America*, 26 FEP 1340 (N.D.Ohio, 1981). The opinion of the District Court below is reproduced at App. B-1.

Circuit held in 1983 that it did not. The Seventh Circuit held in 1985 that it did. Apart from these two decisions, no other reported cases have considered this question, and we are unaware of any litigation, other than the two USWA actions, raising the issue. At present, only this case survives, the *Anness* suit having been dismissed on July 18, 1985, pursuant to a voluntary settlement by the parties following remand.

ARGUMENT

We believe that the Seventh Circuit was right, and we wholly endorse its reasoning. (See: App. A-17:32) But the controlling question at this juncture is not which Court of Appeals was correct. Rather, it is whether the conflict is sufficiently important to warrant the granting of the Petition. Clearly, it is not.[7]

Crucially, the conflict at bar turns on an interpretation of an expired statute. It has long been understood that review of such a conflict will be denied to husband the scarce decisional resources of this Court. Thus, Mr. Justice Harlan, writing as if he had this very case in mind, observed a quarter century ago:

> [F]inally, even where a "true" conflict may be said to exist, *certiorari* will sometimes be denied . . . where

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7. The Petition also presents a second question for review: "whether the consenting Petitioners are time-barred from joining into the originating Petitioner's timely-filed suit." (Petition, i). Petitioners acknowledge that this issue was not addressed by the Seventh Circuit but suggest that judicial economy would be served if it were taken up by this Court. (*See*: Petition at 34-35). We believe the opposite to be true, and past opinions of this Court holding that such issues are to be reserved for remand support our view. *See e.g.*: *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 at 568 (1981) *United States v. United Continental Tuna Corp.*, 425 U.S. 164 at 181-82 (1976), and *Wood v. Strickland*, 420 U.S. 308 at 326-327 1975). Accordingly, the second question provides no support for granting the Petition.

> the impact of the conflict is narrowly confined and is not apt to have continuing future consequences *as where a statute has been repealed or is about to expire . . .*" Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austral L.J. 108 at 112 (1959) [emphasis added].

Here, of course, the underlying statute is not merely about to expire; it is long dead. Section 2(b) lapsed on January 1, 1980, the last date on which any employer could have lawfully retired any employee at age 65 under its terms. Thus, the question presented by the Petition has been academic for nearly six years and can never arise again. In short, the expiration of the statute has made the problem go away. In such circumstances, this Court has repeatedly denied Petitions for review of conflicts. *See, e.g.: United States v. Abrams*, 344 U.S. 855 (1952); *Community Services, Inc. v. United States*, 342 U.S. 932 (1952); *Sokol Bros. Co. v. Commissioner*, 340 U.S. 952 (1951); *United States v. Beal*, 340 U.S. 852 (1950).[8] An identical result is warranted here.

An independent basis for denying the Petition is grounded in the realization that the question of whether the §2(b) exemption reaches retroactively effective collective bargaining agreements was raised in no other case, past or present, other than *Anness* and is of importance, therefore, only to USWA and the Petitioners here. This court, in turn, has long emphasized that it does not " . . . sit for the benefit of the particular litigant." *Rice v. Sioux City Memorial Park Cemetary*, 349 U.S. 70 at 74 (1955). And where, as here, the question presented is of importance to only the parties and not the public, a Petition is properly denied. *id.* at 79.

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8. These four cases are discussed in Stern, "Denial of Certiorari Despite a Conflict," 66 Harv. L. Rev. 465 at 466-68 (1953) and Stern and Gressman, *Supreme Court Practice*, §4.4 at 270-71, (5th ed., 1978).

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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